No. 80-716

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LONE STAR STEEL COMPANY
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED MINE WORKERS OF AMERICA
Intervenor

INTERVENOR'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Intervenor, United Mine Workers of America, hereinafter referred to as the "Union," respectfully submits this brief in response to the Petition for Certiorari filed herein by Petitioner, Lone Star Steel Company, hereinafter referred to as "Lone Star." References to specific parts of Lone Star's Petition for a Writ of Certiorari will be designated as P—. The National Labor Relations Act, as amended, 29 U.S.C.A. §§151 et seq, and

sections thereof will be referred to as "The Act." The National Labor Relations Board will be referred to as "The Board."

STATEMENT OF THE CASE

The Union generally agrees with the statement of the case as presented in Lone Star's Petition for a Writ of Certiorari filed with this Court. The Union would object to that portion of the Statement of Facts where Lone Star asserts that the Successorship Clause and Coal Lands Clause "bind assets and operations outside the immediate bargaining unit to the terms of the contract, and allow the union to prohibit sales, leases and a variety of business relationships unless the neutral purchaser or Lesses agreed to assume the entire UMWA agreement (P. —5). This, of course, is not a statement of the facts of this case but rather is a statement of the ultimate issue for this Court to resolve.

The Union agrees with Lone Star's evaluation of the Board's ruling on whether the Successorship Clause violated Section 8 of the Act except that the Union would point out that the basis of the Board's decision, based on its earlier rulings, was that the sale or transfer of the mine by Lone Star would amount to no more than a substitution of one entity for another while the conduct of business continues without interruption. Therefore, the Board found, it would not be a transaction within the

Act's protection. (P—C-8). It was this language on which the Board's decision was based.

As to whether the Successorship Clause was a mandatory subject of bargaining the Union would urge that Lone Star's statement that the Board did not find fatal that the Clause required the assumption of the entire collective bargaining contract, including several non-mandatory and illegal provisions contained in the contract, is untrue. Those issues were not before the Board and were not ruled on. The Board made no finding as to the relationship of the Successorship Clause to any other clause in the contract. In addition, other than the Coal Lands Clause the Board made no finding as to the legality of any other clause in the contract. The only finding made as to the Successoship Clause was that it was legal and that it was a mandatory subject of bargaining.

Lone Star correctly analyzes the Tenth Circuit's holding as to whether the Successorship Clause violates §8(e) of the Act except when it implies that the "products test" requires the existence of an "end product." This is a term coined by Lone Star and appears nowhere in the Tenth Circuit's opinion. Also, the Union would urge that the conclusion reached by Lone Star that an agreement which cannot meet either the products test or the cease doing business test falls outside the parameters of the act regardless of whether it has a secondary result or goal does

not follow logically from the opinion. Although not directly dealt with, the Union would urge that the most logical reading of the opinion is that an agreement is not secondary if it does not pass the products and/or cease doing business test.

As to the issue of whether the Successorship Clause is a mandatory subject of bargaining Lone Star states that the Tenth Circuit held that the intent of purchasers and the managerial right of employers are not proper factors in a test of whether or not the employees in the unit are "vitally affected." What the Tenth Circuit actually held is as follows:

> "The classification of bargaining subjects as 'terms or conditions of employment' is a matter of special Board expertise. *Meat Cutters vs. Jewel Tea Company,* 381 U.S. 676, 685-86. Its judgment as to what is a mandatory subject is entitled to considerable deference. *Ford Motor Company (Chicago Stamping Plant) vs. N.L.R.B.,* 441 U.S. 448, 495. We cannot say that applying the 'vitally affects' test here so as to assure survival of the previously negotiated wages and working conditions of the Starlight Mine Employees, the Board 'neglected to give the adverb its ordinary meaning' *Pittsburgh Plate Glass Company,* supra, 404 U.S. at 182. . . .
>
> "Moreover in *Pittsburgh Plate Glass,* the company merely stated that 'the affect on the employer's freedom *may be equally important.*' 404 U.S. at 157, N. 19. (Emphasis Added.) To accept Lone Star's contention would mean that an employer's

> freedom to rearrange his business would not be balanced here by some protection to the employees from a sudden change in the employment relationship . . . We are satisfied that the Board struck a proper balance here in applying the 'vitally affects' test."

Clearly the Court rejected the idea advanced by Lone Star that the managerial concerns should be the only factor considered and found that the Board had correctly weighed all relevant factors. The holding of the 10th Circuit was that the interest of purchasers, the managerial rights of the employers and the rights of the employees to protection from a sudden change in the employment relationship are all factors to be weighed in applying the "vitally affects test."

REASONS FOR DENYING THE WRIT

I

There is no split of authority among the circuits concerning the question of whether the successorship clause is a mandatory subject of bargaining.

As its first ground for seeking a writ of certiorari to the Tenth Circuit Court of Appeals Lone Star claims a split of authorities between the Tenth Circuit and the Third Circuit on the question of whether the Successorship Clause herein involved was a mandatory or permissive subject of bargaining. The Tenth Circuit in the case at bar found that the clause "vitally affects" the terms and condi-

tions of the employment of the bargaining unit employees. Lone Star claims that this decision represents a departure from the decision handed down in *Amax Coal Company vs. N.L.R.B.,* 614 F.2d 872 (3rd Cir. 1980).

The Union considers this to be a strange argument for Lone Star to make in view of footnote No. 13 on page 887 of Amax. That footnote states:

> "Because the complaint in this case did not specifically allege that the successorship clause was a nonmandatory bargaining subject apart from its legality under §8(d), the ALJ made no finding with respect to that question. The company's exceptions to the Board relating to the ALJ's findings with respect to the successorship clause did not question this issue, and because it filed no motion for reconsideration with the Board challenging the Board's subsequent failure to do with it, §10(e) 29 U.S.C. §169(e), of the act precludes the company from raising the issue in this court."

Clearly *Amax* deals only with the legality of the clause, i.e., whether the clause was a violation of §8(e) of the act. The Third Circuit specifically refused to make a decision on the question of it being a mandatory or permissive subject of bargaining. Such a misstatement of the holding of *Amax* would seem to be an attempt by Lone Star to purposely mislead this Court. But the misstatement made by Lone Star in their petition (P—13) is so gross and so easily demonstrated to be inaccurate that it is difficult for the Union to ascribe an evil motive to Lone Star. Suf-

fice it to say that as far as the issue of whether the Successorship Clause is a mandatory or permissive subject of bargaining is concerned the decision of the Tenth Circuit in the case at bar and the decision of the Third Circuit in *Amax* are not in conflict and therefore such a supposed conflict cannot be used as a ground for this court granting a writ of certiorari.

Lone Star also suggests that the Tenth Circuit ruled contrary to its own precedent in the case at bar. Lone Star argues that the Tenth Circuit in *Newspaper Printing Corp. v. N.L.R.B.*, 625 F.2d 956, (10th Cir. 1980) found that parties may not bargain to an impasse over a change in the scope of a bargaining unit. Lone Star urges that the Successorship Clause in the case at bar would improperly enlarge the scope of the bargaining unit. Lone Star does not explain exactly how the Successorship Clause would accomplish such an enlargement of the bargaining unit. In fact, the clause has nothing to do with the size of the bargaining unit. The clause deals with whether any new entity acquiring ownership fo the coal mine in question will have to accept the unit that has been created by bargaining between Lone Star and the Union. In no stretch of the imagination can this situation be analagous to the facts of *Newspaper Printing Corporation v. N.L.R.B.*, supra, as is suggested by Lone Star. In *Newspaper Printing Corporation* the employer was found to have insisted to an impasse over the following proposed

contractual provision:

> "The jurisdiction of the union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the employer may from time to time designate to be performed in the composing room. It is the express intention of the employer to accomplish his complete production needs in the manner which he determines to be the most effective and economical method to fulfill the work requirements."

The Tenth Circuit found this clause to be permissive because the employer was demanding the right to transfer work out of the unit at will thereby circumventing the union's right to represent the employers in the composing room. This was not, the Court found, a clause dealing with transfer of work out of the bargaining unit or the effect of automation on the bargaining unit, which were found to be mandatory subjects of bargaining.

These were the issues that were dealt with in *Newspaper Printing Corporation.* These issues are obviously not the issues which faced the Tenth Circuit in the case at bar. The Successorship Clause presents no question concerning the size of the bargaining unit. The issue is whether the unit already established will have to be recognized by another employer. Nothing in the *Newspaper Printing Corporation* case has any relevance to the case at bar and obviously the holding in the two cases cannot be inconsistent.

Lone Star states that the case below if allowed to stand will permit a union to bargain for an expanded unit and to preserve what would otherwise be permissive subjects of bargaining if viewed individually. However, as outlined above, the Successorship language has nothing to do with enlarging or diminishing the size of the bargaining unit. The two issues are so separate that, quite frankly, the Union fails to grasp the concern which is expressed by Lone Star in this regard. The Successorship Clause's only relevance to the size of the bargaining unit is that any successor to Lone Star will be required to accept the bargaining unit as established in the contract between Lone Star and the Union. That requirement certainly does not mandate an expanded bargaining unit. In fact, it mandates a bargaining unit exactly as previously established for the entire life of the negotiated contract.

Lone Star also states that the Successorship Clause in some way insulates illegal clauses from being declared illegal. Lone Star cites no authority for the proposition that a clause which was illegal as to the original employer will be transformed into a legal clause through the operation of the Successorship Clause. There is nothing in the clause which changes the effect an illegal clause would have as to Lone Star or as to a successor of Lone Star.

In addition, the Successorship Clause would also dictate that Article XXIX, the Severability Clause, would be binding on any successor of Lone Stars. That clause reads:

> "Section (a) Except for the provision of §(b) of this agreement is declared invalid, all other provisions and agreements shall remain in full force and effect.
>
> "Section (b) In the event the parties are restrained or prohibited by any agency or branch of the federal or state government from implementing or effectuating the economic benefits, including health and retirement fund payments, required by this contract, either party herto, may, after imposition of such restraint, give 60 days notice of termination of this agreement and, thereafter shall meet and discuss and attempt to agree on the basis for the continuation of the agreement for its term. If no agreement is reached within the 60 day period, the agreement will terminate."

Clearly this clause contemplates, as to a successor, that any clause which is found to be illegal will be stricken from the contract with the rest of the contract continuing in full force and effect. The only exception are those clauses dealing with economic issues. The illegality of one of those clauses in effect amounts to a termination of the contract.

Lone Star fears that the Successorship Clause could somehow legitimatize otherwise illegal clauses. But the Successorship Clause applies the entirety of the contract to any successor. This includes the severability clause which by its terms contemplates the possibility that not all of the contract will remain intact until the end of its term but that some of it may be stricken down. Lone Star's assertion that the successorship clause will legitimize otherwise il-

legal clauses is groundless. A clause which is illegal is in no way, by the law, converted into a legal clause simply because a successorship clause is included in the contract. While a successor may be required to accept the entirety of a contract, that necessarily means that the successor has to accept only that portion of the contract which is legal. A successor, no more than an original signatory, can have an illegal clause thrust upon it.

II

The Successorship Clause in no way affects the decision of management as to the potential sale of assets.

Lone Star next urges review based on issues which are not a part of the present litigation. Lone Star urges that the language of the proposed successorship clause will place a burden on potential successor employers which would be violative of the Court's decisions in such cases as *John Wiley & Son, Inc. v. Livingston,* 376 U.S. 543 (1964); *N.L.R.B. v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972) and *Howard Johnson Company, Inc. v. Detroit Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union,* 417 U.S. 249 (1974). However, these cases all deal with the duties owed by a successor employer to a union who had negotiated a contract with the previous employer. That is not the issue under discussion in the case at bar.

The question presented in this case is whether this clause is mandatory or permissive as between the parties to the contract.

The Tenth Circuit found the clause to be a mandatory subject of bargaining since it "vitally affected" the working relationship between the employer and the employees in the particular bargaining unit involved. Lone Star now asks this Court to weigh the vitally affects aspects of the clause as against the rights of potential successor employers. While in the proper circumstances this concern may be a valid one, it is not a part of this litigation. *Wiley, Burns* and *Howard Johnson* all recognize that the duties under a contract incumbent on the signatory of the employer are far different from the duties of a successor employer. In *Howard Johnson,* the court recognized that a far more vaguely worded successorship clause than exists in the case at bar could provide strong remedies against the signatory employer. In note 3 on page 224 of the opinion the court found:

> "The union apparently did not explore another remedy which might have been available to it prior to the sale, i.e., moving to enjoin the sale to Howard Johnson on the ground that this is a breach by the Grissoms of the successorship clause in the collective bargaining agreement."

The successorship clause involved in the two contracts in *Howard Johnson* stated simply that the contracts would

be binding upon the employer's "successors, assigns, purchasers, lessees or transferees."

The clause in the case at bar seeks to insure that the contract which was negotiated will survive any change in ownership. It cannot be rationally argued that such a goal is not a legitimate work preservation device and as such a mandatory subject of bargaining between the signatories to the contract.

Another purpose of the agreement is to negotiate about the affects of the decision to sell the business. This has been held to be a mandatory subject of bargaining. However, Lone Star would urge that the clause makes the Union a forced partner in its decision to sell. But the obligation to the Union under the negotiated agreement is no different from any other obligation of the employer and gives the union no greater "partnership" in a decision to sell than is held by any creditor of the employer. If and when the employer plans a transfer, obligations of all kinds, union contracts, trade creditors, secured creditors, etc., will help determine the structure the transfer will take. While the clause under scrutiny might help determine the structure of any transfer it has nothing to do with the decision to attempt to sell. The operation of the clause must be measured as it will affect the parties to the contract. The effects of the decision to sell assets is a proper subject of bargaining. Since this clause has nothing to do

with the decision to sell assets but rather only with the effects of that decision on the union members it must be upheld as a proper subject for mandatory bargaining. See *General Motors Corp.*, 470 F.2d 442 (C.A.D.C. 1972).

III

The Successorship Clause is not secondary in nature and is therefore not violative of Section 8(e) of the Act.

Lone Star's argument as to the application of Section 8(e) of the Act to the Successorship Clause herein under discussion seems somewhat muddled. The approach which the Union would urge and which the decision made below reflects is simple. This clause violates neither the spirit nor the letter of the statutes.

In the first place §8(e) of the Act specifically provides that certain activities are to be barred if they are of the nature where a union is taking some action against an employer to cause that employer to cease or refrain from handling, using, selling or otherwise dealing in the products of any other employer or to cease doing business with an employer who is engaged in a dispute with the Union.

Section 8(e) was passed only to plug a loophole which existed in the law. This Court held in *Local 1976 United Brotherhood of Carpenters, etc. v. N.L.R.B. (Sand Door)*, 357 U.S. 93 (1958) that the mere execution of a so called hot cargo clause in a contract or its voluntary ob-

servance by an employer was not a violation of the statute which made it an unfair labor practice to engage in activities designed to bring about the cessation of handling products or doing business. In *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967) this Court found that §8(e) of the Act was passed to make the mere existance of such a clause illegal and unenforceable but it was not meant to broaden the prohibition of the activities to be considered illegal which were recodified under Section 8(b)(4)(A) of the Act. Section 8(b)(4)(A) of the act is applicable only to "protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer." *National Woodwork Manufacturers Association v. N.L.R.B.*, supra.

Therefore, the threshold question which must be reached is whether this successorship clause entails the kind of activity which is proscribed by §§8(b)(4)(A) and 8(e). Judicial decisions interpreting the broad language of §8(b)(4) of the act have uniformly limited its application to so-called secondary situations in order to conform with the dual congressional objective of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own. See *N.L.R.B. v. Denver Building and*

Construction Trade Council, 341 U.S. 675 (1951). This Court therefore refused to read §8(b)(4)(A) to ban traditional primary strikes and picketing having an impact on neutral employers even though the activity fell within the sweeping term of the statute. See *N.L.R.B. v. International Rice Milling Company,* 341 U.S. 665 (1951). Thus, however severe the impact of primary activity on neutral employers, it will not thereby be transformed into activity with a secondary objective.

One of the situations in which the Court has held the activity was not secondary and thereby not illegal was the so-called "allied doctrine" cases. The rationale for these findings was the inapplicability of the provision's central theme, the protection of neutrals against secondary pressure, "where the secondary employer against whom the union's pressure is directed has entangled itself in the vortex of the primary dispute." See *National Woodwork Manufacturers Association v. N.L.R.B.,* supra. In the typical allied doctrine case the pressure applied was aimed toward employers who were performing work under contracts for the primary employer that was, in fact, the work of a striking employee. The courts found that the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it.

Obviously, the facts in the case at bar differ significantly from the "allied doctrine" cases but the theory as to

the secondary boycott is equally applicable. Successorship language would come into effect only upon the opening of negotiations between Lone Star and another entity for the sale of all or part of the assets involved. It can hardly be argued that at this point in time a potential successor has not "entangled himself in the vortex of the primary dispute." It is the existence of the potential successor that creates the primary dispute. Therefore, any action taken by the Union against a potential successor would not be extending its activities to a front remote from the immediate dispute. A potential successor is intimately and inextricably tied to any dispute which arises over successorship.

The Union would therefore urge that this provision or any action taken pursuant to this provision against a potential successor does not involve a secondary boycott situation since the effects of the provision are clearly primary.

But even if it could be found that the effects of the successorship clause are secondary, previous decisions hold that §§8(b)(4)(A) and 8(e) deal with situations involving the handling, selling or otherwise dealing in the products of another employer or that cessation of doing business with any other person. The case at bar does not deal with either of these situations and therefore the statute is not applicable.

Every forum that has heard this dispute has agreed that in the facts of the case at bar the sale of the Starlight Mine could not be considered "doing business" as that term is used in §§8(b)(4)(A) and 8(e). The Tenth Circuit found after examining the legislative history of the statute that Congress was not concerned with agreements relating to the sale of businesses or their assets as was done in the case at bar. The Court found that the cease doing business language was added out of a concern that the phrase would be used in contracts to circumvent the previously adopted language of cease or refrain from handling or transporting any of the products of another employer. To hold other than was done by the Tenth Circuit would be a departure from both the clear language and legislative history of the statute. In addition, the Tenth Circuit's holding is consistent with the Third Circuit's findings in *Amax Coal Company v. N.L.R.B.*, supra, involving an identical successorship clause. In *Amax* the Court found:

> "The phrase 'doing business' refers to a continuing business relationship which is capable of being discontinued by one employer in order to force another employer to accede to union demands. . . . Thus as noted earlier, Section 8(e) was designed to protect neutral employers and their employees, not involved in a labor dispute, from being pressured to assist a union in a dispute with another employer.
>
> "Here, it is clear that the sale by Amax of all or part of its business operations would involve no continuing relationship with the purchaser. There is

> therefore no possibility of involving Amax in a labor dispute between the purchaser and its employees."

As to the products test, common sense would lead to the conclusion that the sale of mineral rights should not be considered as a product of Lone Star. Lone Star is in the business of manufacturing steel products. In order to insure an adequate supply of coal to use in the steel making process, Lone Star obtains coal from outside sources and from coal lands owned or leased by Lone Star. Under these facts there can be little doubt that the coal lands are not products of Lone Star. Therefore, any clause dealing with the sale of coal lands cannot be within the provisions of §§8(b)(4)(A) and 8(e).

Lone Star has not cited a single case in which the position it takes has been upheld either as to the "products test" or the "cease doing business" test. Lone Star presents its arguments based on policy grounds about how the statute involved should be interpreted to affect the policy which Lone Star deems to be in its best interest. Lone Star's interpretation flies in the face both of the clear language of the statute and previous court decisions interpreting same. Lone Star is asking this Court not to interpret the statute as it is found, but rather it is asking this Court to re-shape the policy behind the legislation. Others

have come before this Court with the same request and this Court has refused to do so. In *N.L.R.B. v. Insurance Agent's International Union,* 61 U.S. 477 (1960) this Court stated:

> "It is suggested here that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. Major revisions of the basic statute were enacted in 1947 and 1959. To be sure, then, Congress might be of the opinion that greater stress should be put on the role of 'pure' negotiation and settling labor disputes, to the extent of limiting more and more economic weapons from the parties' grasp, and perhaps it might start with the one involved here; or in consideration of the alternative, it might shrink from such an undertaking. But Congress' policy has not yet moved to this point and with only §8(b)(3), we do not see how the Board can do so on its own."

See also *National Woodwork Manufacturer's Association,* supra.

The statute and the case law clearly supports the Union's position in this matter. Lone Star seems to recognize that fact when it points to no authority which supports its position. The policy arguments which Lone Star makes are inappropriate in this forum.

IV

The scope of the Successorship Clause is sufficiently narrow by its own terms so as to make it a fair and just clause as between the parties.

Finally, Lone Star's argument as to the scope of the Successorship Clause is based on at least two faulty premises. First, by stating that the rule of *ejusdem generis* as applied here runs headlong into the statutory ruling prohibiting and secondary object of an agreement, Lone Star assumes the Successorship Clause has a secondary object. There has never been any such finding in this case and as outlined above the object of the clause is primary and not secondary. Secondly, Lone Star assumes that the holding in the *Amax* case somehow affects the outcome of this matter. The clauses which were the subject of the Amax decision are not under review in the case at bar, and in fact have not been under scrutiny during any part of this litigation, and for the purpose of this review these clauses must be considered as valid. To apply the decision of another court to an issue not a part of this litigation is clearly beyond the scope of the review of this Court. The contract must be interpreted as it stands before this Court in this case. Therefore, the principal of *ejusdem generis* was properly applied by the Tenth Circuit below.

Finally, any dispute which may arise over the interpretation of an ambiguous clause in the contract must be

construed most strongly in favor of Lone Star and against the Union since the contract was drafted and set forth by the Union. Clearly, the Successorship Clause speaks to the sale or conveyance of the property. The Tenth Circuit properly characterized these types of transactions as "permanent in character." If the Union and Lone Star had a dispute as to whether "otherwise transferring or assigning" meant something other than a means of permanently transferring property, the Union's position of broadening the clause beyond the scope of a permanent transfer must surely fail. Even if the Court found the language created an ambiguity as to leasing or sub-contracting, that ambiguity under general contract principles would be decided against the Union. Lone Star's protestations as to the scope of the clause are nothing more than "crying wolf." This clause is sufficiently limited by its own terms and no court would allow it to be broadened over the protest of Lone Star.

CONCLUSION

Lone Star has presented no grounds for the granting of a Writ of Certiorari in the captioned matter.

Lone Star has not pointed to a split among any of the Circuits on any of the issues herein involved. Further, Lone Star has not shown where the decision by the Tenth Circuit Court of Appeals was either not supported by

evidence presented or contrary to the provisions of the statutes under discussion or court rulings interpreting those statutes. Therefore, Intervenor, United Mine Workers of America, prays that Lone Star's Petition for Certiorari to the Tenth Circuit Court of Appeals be denied.

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